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ROHAIDA AHMAD BASRI v. PP

HIGH COURT MALAYA, KOTA BHARU
AHMAD BACHE JC
[CRIMINAL APPEAL NO: 41-S-24-6-2015]
30 MARCH 2017

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CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 12(2) – Possession of dangerous drugs – Exclusive access and control of premise where drugs were found – Proof of possession of things found in premise – Allegation that others also had access to premise – Whether negated guilt of accused*

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CRIMINAL PROCEDURE: *Appeal – Conviction and sentence – Offence of possession of dangerous drugs – Non-exclusive custody and control of premise where drugs were found – Whether negated guilt of accused – Whether conviction and sentence safe*

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Following information received about a drug related activity at a house ('the house'), SP4, together with his team ambushed the house in question. SP4 searched the kitchen and found below the kitchen or 'rak simen', one blue plastic box container. When SP4 tried to retrieve the box container, the appellant tried to obstruct him by snatching it from SP4, but failed. Inside

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the blue container, a red 'tupperware container' was found. Five packets of blue plastic bags containing several pills suspected to be drugs were found inside the red 'tupperware container'. Upon analysis, it was confirmed that the drugs were methamphetamine weighing 14.07g. The appellant was then charged for an offence of possession of dangerous drugs under

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s. 12(2)/39A(1)(i) of the Dangerous Drugs Act 1952 ('DDA'). The Magistrate found that the prosecution had established a *prima facie* case on the grounds that (i) the appellant had exclusive possession and control of the house; and (ii) the appellant's conduct in obstructing SP4 amounted to knowledge of the drugs pursuant to s. 8 of the Evidence Act 1950 ('Act'). Accordingly, the appellant was found guilty and sentenced to 30 months

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imprisonment. Dissatisfied, the appellant appealed.

Held (acquitting and discharging accused):

(1) The prosecution had failed to exclude the possibility of access by others to the drugs in question. It was the prosecution's evidence that there was

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a male Malay in the house *ie,* the son of the appellant by the name of Zulazhan. He was not called to give evidence. His evidence was important because he stays in the house. He was even present during the raid and was arrested together with the appellant. It might just well be that the drugs belonged to him. Without calling him to give evidence to

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the contrary, this fact of his accessibility to, or even ownership of the drugs, remains unrebutted. Further, the prosecution's failure to call Zulazhan has also created a gap in the prosecution's case. (paras 20, 21 & 39)

(2) SP6 opened the house by obtaining the keys from someone staying in front of the appellant's house ('Mr X'). No evidence were led by the prosecution to show the length of time Mr X had custody of the keys to the house, or any information regarding his safekeeping of the keys. The possibility of Mr X having access to the house and the drugs cannot possibly be discounted. Thus, without calling Mr X to give evidence, such fact of accessibility remains unrebutted. (paras 22 & 23)

(3) The arrest and detention of the appellant was based on information received, of which this court had to be cautious, as there was always the possibility that the drugs were planted. The Magistrate failed to analyse critically the evidence before him when he failed to take this fact of accessibility to others into account and that s. 114(g) of the Act *ie*, adverse inference should be invoked against the prosecution for the non-calling of witnesses. Such failure is fatal. On this point alone, the defence should not have been called and the appeal ought to be allowed. (para 38)

(4) As the burden of the appellant is just to raise a reasonable doubt, at the end of the defence case, this court had found that the defence had successfully discharged that burden, and that the prosecution had failed to prove its case beyond a reasonable doubt. Therefore, the conviction found by the Magistrate was wrong and unsafe. (para 57)

(5) Not all conduct is admissible under s. 8 of the Act. Only the conduct that is relevant to the facts in issue are admissible. Once admitted as evidence, the onus is on the accused to explain such conduct of his under s. 9 of the Evidence Act. Insofar as this case is concerned, this court believes the version of the defence that the appellant did not obstruct SP4 in opening the container which contained the drugs, hence the question of conduct does not arise. (paras 60 & 61)

Case(s) referred to:
Azizan Yahaya v. PP [2012] 8 CLJ 405 CA ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Husin Sitorus v. PP [2012] 7 CLJ 205 CA ***(refd)***
Ibrahim Mohamad & Anor v. PP [2011] 4 CLJ 113 FC ***(refd)***
Karthi Gopal v. PP [2015] 1 LNS 1443 CA ***(refd)***
Lean Siew Boon & Anor v. PP & Other Case [2013] 1 LNS 979 CA ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
Mazlani Mansor v. PP [2013] 1 LNS 1292 CA ***(refd)***
Mohamad Abdul Rahman v. PP [2013] 7 CLJ 843 CA ***(refd)***
Mohammad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Ooi Chee Seong & Anor v. PP [2014] 7 CLJ 505 CA ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Alfian [2011] 1 LNS 1731 CA ***(refd)***
PP v. Ang Kian Chai [2012] 1 LNS 389 CA ***(refd)***

A *PP v. Dato' Seri Anwar Ibrahim (No. 3) [1999] 2 CLJ 215 HC* ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
Teh Hock Leong v. PP [2008] 4 CLJ 764 CA ***(refd)***
Teng Howe Sing v. PP [2009] 3 CLJ 733 FC ***(refd)***

Legislation referred to:
B Courts of Judicature Act 1964, s. 50(2)
Criminal Procedure Code, s. 112
Dangerous Drugs Act 1952, ss. 12(2), 39A(1)(i)
Evidence Act 1950, ss. 8, 9, 114(g)

For the prosecution - Noriah Osman & Ainul Wardiah; DPP
C *For the appellant - Ahmad Nizam Mohamad & Alias Ibrahim; M/s Alias Ibrahim & Co*

[Editor's note: Appeal from Magistrate's Court; Case No: MMGM (T) 83D-25-01-2014.]

Reported by Sandra Gabriel

D **JUDGMENT**

Ahmad Bache JC:

Background

[1] The appellant, a religious teacher ("ustazah"), was charged of an
E offence of having in her possession dangerous drugs ie, 14.07g of methamphetamine, an offence punishable under s. 12(2)/39A(1)(i) of the Dangerous Drugs Act 1952. At the end of the defence case, the learned Magistrate found her guilty, convicted her and sentenced her to 30 months imprisonment.

F **[2]** Dissatisfied, the appellant filed an appeal to this court. Having heard the submissions by both parties, this court found her not guilty, acquitted and discharged her and set aside the decision of the learned Magistrate.

[3] Dissatisfied with that decision, the Public Prosecutor had appealed against the decision of this court.

G **[4]** These are the grounds for the decision of this court.

The Charge

[5] The charge against the appellant/accused was as follows:

H Bahawa kamu pada 7/9/2013 jam lebih kurang 8.00 malam di sebuah rumah No. 3381-A Jalan RPT Sungai Terah, di dalam Daerah Gua Musang, di dalam Negeri Kelantan, tanpa sebarang kebenaran atau kuasa dalam mana-mana Akta Dadah Berbahaya tahun 1952 didapati ada dalam kawalan kamu 14.07 gram dadah jenis Methamphetamine. Oleh yang demikian itu kamu telah melakukan satu kesalahan di bawah Sekysen
I 12(2)ADB 1952 yang boleh dihukum di bawah Seksyen 39A(1) ADB 1952.

The Brief Facts Of The Case

[6] The facts of the case can be gleaned from the grounds of judgment of the learned Magistrate at pp. 8 to 12 of the appeal record as set out in the following paragraphs.

[7] According to the complainant/raiding officer, SP4, following information received that there was a drug related activity, at No. 3381-A RPT Sg. Terah, Gua Musang, Kelantan, on 7 September 2013 at 8pm, together with his team which comprised six other men and one woman police officers, ambushed the house in question.

[8] Before the ambush, SP4 made some observation for ten minutes of the said house. He found the front and the back door of the house shut and the lights were on. He also heard some conversations between a male and a woman. During that ten minutes observation, there was no physical movement like people coming in and out of the house.

[9] Upon SP4 knocking on the front door of the house, the accused opened the door. SP4 then identified himself as a police officer and notified the reason for the raid. Together with the accused in the house, he saw one Malay male, whom he later found out was the accused's son.

[10] SP4 and his team went to the living room area of the house and found nothing incriminating. SP4 then proceeded to the kitchen area and searched the kitchen and found below the kitchen or "rak simen" one blue plastic box container. When SP4 tried to retrieve the box container, the accused tried to obstruct him by snatching it from SP4, but failed. After giving the statutory caution, SP4 then took the blue container and opened it. Inside the blue container was found a red "tupperware container".

[11] Inside the red "tupperware container" was found five packets of blue plastic bags containing several pills suspected to be drugs. The drugs were then confiscated, and Koperal Nadia arrested her, while Koperal Fazrul arrested the son. They were subsequently brought to the IPD Gua Musang for further investigation.

[12] Upon analysis by the chemist, it was confirmed that the drugs were methamphetamine weighing 14.07g.

[13] Hence, the charge against the accused.

Question Of Law Posed By The Prosecution

[14] As required under s. 50(2) of the Courts of Judicature Act 1964, the Public Prosecutor had posed the following question of law:

> sama ada perlakuan Responden yang menghalang anggota serbuan untuk membuka bekas yang mengandungi dadah menunjukkan Responden mempunyai pengetahuan selaras Seksyen 8 Akta Keterangan 1950.

A **Findings Of The Magistrate**

[15] At the end of the prosecution case, the learned Magistrate found the prosecution had successfully proved a *prima facie* case and ordered the appellant/accused to enter her defence.

B **[16]** At p. (12) of the records of appeal (RA) the learned Magistrate made a finding that:

> Di dalam kes ini Mahkamah dapati Pihak Pendakwaan telah berjaya membuktikan satu kes *prima facie* terhadap Tertuduh. Pihak Pendakwaan telah membuktikan intipati-intipati pertuduhan di bawah Seksyen 12(2) ADB 1952. Di dalam kes ini tarikh, masa, tempat kejadian dan barang kes iaitu 14.07 gram Methamphetamine telah dibuktikan oleh pihak Pendakwaan melalui keterangan-keterangan yang dikemukakan dan ianya juga tidak dipertikaikan oleh pihak Pembelaan.

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[17] The learned Magistrate had scrutinised the evidence of all the prosecution witnesses. At p. 13 of the RA, this was what the Magistrate said:

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> Menurut SP4 iaitu Pegawai Serbuan, ketika pemeriksaan di ruang dapur rumah OKT, Lans Koperal Fazrol telah menjumpai sebuah bekas berwarna biru berpenutup kelabu dan Lans Koperal Fazrol telah menyerahkan bekas tersebut kepada SP4. Dan ketika SP4 hendak membuka bekas tersebut OKT telah menghalang SP4 daripada membuka bekas tersebut. Setelah membuka bekas tersebut SP4 dapati di dalamnya terdapat satu Tupperware merah berpenutup putih yang mengandungi balutan kertas yang mengandungi pil-pil. Menurut SP4 pemeriksaan ini dibuat di hadapan OKT, anak OKT dan juga beberapa anggota yang berada di dalam rumah pada masa tersebut. Keterangan SP4 ini disokong oleh keterangan SP5 dan SP7 yang juga ada bersama ketika kejadian. Keterangan SP5 dan SP7 berkenaan dengan kejadian ini juga adalah konsisten di antara satu sama lain.

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[18] Further, the learned Magistrate stated that:

> Penemuan dadah di ruang dapur rumah OKT sendiri menunjukkan OKT mempunyai milikan, jagaan dan kawalan ke atas dadah tersebut. Tambahan lagi kelakuan OKT yang menghalang SP4 membuka bekas biru yang mengandungi dadah tersebut juga menunjukkan pengetahuan OKT ke atas dadah yang tersimpan di dalam bekas tersebut. Kenapa hanya OKT sahaja yang menghalang dan anak OKT yang juga ada pada masa tersebut tidak menghalang SP4 daripada membuka bekas biru tersebut menunjukkan hanya OKT tahu adanya kandungan barang salah di dalam bekas tersebut dan OKT tidak mahu SP4 memeriksanya. Reaksi atau tindakan OKT ini adalah satu keterangan yang relevan dan diterima di bawah Seksyen 8 Akta Keterangan 1950.

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Duty Of The Court At The End Of Prosecution Case

I **[19]** It is trite that this court is to subject the case of the prosecution to a maximum evaluation of the evidence of all their witnesses at the end of the prosecution's case. This exercise necessarily involves subjecting all the

evidence of the prosecution witnesses (including the credibility of its witnesses) to strict scrutiny (*PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457, *Balachandran v. PP* [2005] 1 CLJ 85, *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 dan *PP v. Dato' Seri Anwar Ibrahim (No. 3)* [1999] 2 CLJ 215). If there are any infirmities in the prosecution's case, then the benefit of the prosecution's failure should be given to the defence. Hence, as could be seen in the following paragraphs, this court too had applied the aforementioned principles in the analysis that it had carried out at the end of the prosecution's case.

Prima Facie

[20] At the end of the prosecution's case, this court, after a thorough scrutiny, by subjecting all the evidence adduced by the prosecution to a maximum evaluation, had found that the prosecution had failed to establish a *prima facie* case. Thus, the accused should have been ordered to be acquitted and discharged without calling for her defence, the main ground being that the prosecution had failed to exclude the possibility of access by others to the drugs in question.

[21] It was the prosecution evidence that there was a male Malay in the house, ie, the son of the accused by the name of Zulazhan. He was not called to give evidence but his statement was recorded by the investigating officer (SP6). His evidence was important because he stays in the house. He was even present during the raid and was arrested together with the accused. It might just well be that the drugs belonged to him. Without calling him to give evidence to the contrary, this fact of his accessibility to, or even ownership of the drugs, remains unrebutted. See the case of *Ang Kian Chai v. PP (infra)*.

[22] It was also in evidence that SP6 went to the house on the next day ie, 8 September 2013 at 3pm together with Inspektor Saufi and Lans Koperal Zaharfendy for further investigation (at pp. 88 and 89 of the RA). Under cross-examination, he admitted that the house was locked. He managed to open the house by obtaining the keys from someone staying in front of the accused's house (termed in the trial as "Mr X") (at pp. 101 and 102).

[23] No evidence were led by the prosecution to show the length of time Mr X had custody of the keys to the house, or any information regarding his safekeeping of the keys. The possibility of Mr X having access to the house and the drugs cannot possibly be discounted. Thus, without calling him to give evidence, such fact of accessibility remains unrebutted.

[24] It was also in evidence that the house belongs to the husband of the accused. At p. 102 of the RA, SP6 was asked under cross-examination.

Soalan : Tahu atau tidak rumah Rohaida itu rumah sewa atau tidak?

Jawab : Rumah suami Rohaida

[25] The prosecution did not re-examine further as to whether the husband had been staying with them or otherwise. In this regard, two inferences had arisen, one being a favourable inference that should be accorded to the accused would be that the husband had been staying with them. However, the husband was not called to testify to exclude his accessibility to the drugs.

[26] SP5, a sub-inspektor in the raiding team under cross-examination was referred to an extract of a "Harian Metro Newspaper" which had reported the news of the arrest at p. 232 of the RA. The newspaper was quoted as saying that from the intelligence (risikan) gathered, the drug activities in that area were believed to involve "Lani Botak's" syndicate. SP5 like SP4, agreed that Lani Botak is not a fictitious character and had agreed that he was arrested.

[27] SP6 admitted he knew that Lani Botak was now detained under "LLPK" suspected of drugs trafficking offences. SP6 cannot determine who gave that information to the media regarding Lani Botak's activities in that area. This court opined that it must have been the police source in view that intelligence reports are gathered by the police. As Lani Botak can be traced, he should have been called to testify to exclude his accessibility to the drugs in question. His purported link to the drugs in question cannot be discounted and Mr X could very well turn out to be him who had held the keys to the house as the police had failed to throw more light on this man because of the poor investigation conducted by SP6.

[28] Indeed it is a settled principle of law that in having to prove its case, the prosecution, and not the accused, has a duty to exclude the possibility of accessibility by other persons to the drugs in question. This has been confirmed by the apex court, time and again, the latest being the Court of Appeal in *Karthi Gopal v. PP* [2015] 1 LNS 1443; [2016] 5 MLJ 274.

[29] In that case, there was evidence that there were two other persons who stayed in the house where the drugs were found, ie, Nelson and his wife Jennifer, and another person. They were not called to testify. In allowing the appeal, the Court of Appeal speaking through Aziah Ali (JCA) had ruled, as stated in the second paragraph of the headnotes:

> The admission of the respondent's witness, SP6 that from her investigation a married couple also stayed in the house and the presence of the DNA of another person on the t-shirt hung behind the door where the drugs were found lend credence to the appellant's version that the said room was accessible to others. It is settled principle of law that the prosecution has a duty to exclude the possibility of access by others to the drugs. In the present case, the respondent had failed to prove its case beyond reasonable doubt as the possibility of access by Nelson and Jennifer had not been excluded, which in turn rendered the conviction of the appellant unsafe (see paras 26-28).

[30] In the Court of Appeal case of *PP v. Ang Kian Chai* [2012] 1 LNS 389; [2012] 4 MLRA 456, the prosecution had failed to call one Chen Jing, a tenant of a house, who was present during the police raid. Evidence was led that she, together with her husband, Goo Aik Hung, and their child, had stayed in the house. None of them was called to give evidence. Chen Jing's statement was recorded under s. 112 of the Criminal Procedure Code but was not even tendered. The Court of Appeal found this omission to be fatal. Abdul Malik Ishak JCA (as he then was) observed as follows:

> [28] The factual matrix showed that the appellant was not alone in the said house when SP4 and his police party gained access inside the said house. Chen Jing and a child of about four years old were also there - inside the said house. Yet, the learned JC invoked the presumption under s. 37(d) of the DDA against the appellant and found him to be in possession of the raw opium. In our judgment, before the learned JC could invoke s. 37(d) of the DDA against the appellant the prosecution ought to have excluded Chen Jing from having custody or control of the raw opium at the material time. This exclusion can only be achieved if the prosecution were to call Chen Jing as a witness or if the prosecution were to tender the s. 112 statement of Chen Jing. Alas, all these were not done. The Federal Court in *Ibrahim Mohamad & Anor v. PP* [2011] 4 CLJ 113 held that the non-tendering of the statement of the owner of the vehicle or the failure of the prosecution to call the owner of the vehicle as a witness raised the pertinent question of who was in actual control of the vehicle immediately prior to the date of arrest. The Federal Court also held that it was the duty of the prosecution to exclude the possibility that other individuals could not have had custody or control of the vehicle immediately prior to the date of arrest. Now, applying the principles in that case to the present appeal at hand, we categorically say that the prosecution had failed to exclude the possibilities that Chen Jing or even Chen Jing's husband (Goo Aik Hiang) or even Khoo Teck Huat whose name was on the water bill of the said house could have had custody or control or access to the raw opium.
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> [29] It is trite law that the onus is not on the appellant to prove the possibility of access to the raw opium by others but rather that onus falls on the prosecution to prove to the court that others could not possibly had access to the raw opium. To put it in another way, it is the duty of the prosecution to exclude such possibility and to prove that the appellant had exclusive possession of the raw opium (*Abdullah Zawawi Yusoff v. Pendakwa Raya* [1993] 4 CLJ 1; [1993] 3 MLJ 1 SC).

[31] In *Husin Sitorus v. PP* [2012] 7 CLJ 205 the prosecution did not exclude the three men who were sleeping in the wheel house of the boat at the time of the police raid. The Court of Appeal had ruled that there was no *prima facie* case, and on the need to exclude, Azhar Ma'ah JCA (as he then was) said:

> [15] There is a welter of authoritative precedents which have held that for possession to be established, accessibility by others to the place where the drugs are found should be excluded by evidence by the prosecution

(*PP v. Kang Ho Soh* [1991] 3 CLJ 2914; [1991] 3 CLJ (Rep) 557 HC, *PP v. Tang Chew Weng* [1969] 1 LNS 141 HC. The onus is not on the defence to prove possibility of access by others but on the prosecution to exclude such possibility and the issue must be answered in favour of the appellant if there were more than one way in which the evidence adduced by the prosecution might be viewed such as in the present case, implicating the appellant or the other persons who were present in the boat (*Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1 SC). In other words exclusivity of custody and control of the drugs ought to be established by the prosecution.

[32] In the case of *Azizan Yahaya v. PP* [2012] 8 CLJ 405, the illegal drugs were found in the room occupied by the appellant and his wife. At the same time, the said room was also accessible to the other occupants of the house who were the appellant's children. The prosecution did not call them but offered them to the defence. On the need to exclude Aziah Ali JCA, said:

[8] We find from the evidence adduced by the prosecution that though the room where the drugs were found was occupied only by the appellant and SP4 but it is pertinent to note that evidence also showed that the room was accessible to all the other occupants in the house. SP4 testified that she and the appellant occupied the main bedroom and the children occupied the other two rooms. In cross-examination SP4 agreed that everybody in the house had access to the room (p. 28 appeal record). The room was unlocked. Thus whilst the occupants of the room were the appellant and SP4 both of whom would have had complete access to the room, it is also apparent that their three children too had access to the room. Yet SP4 was not charged although she was remanded.

[9] We find that the testimony of SP4 regarding access to the room was hardly challenged. SP5 under cross-examination had also agreed that the appellant's children probably had access to the appellant's room. He was not re-examined on this issue. We agreed with learned counsel that the learned judge had failed to analyse or assess these testimonies. The prosecution has failed to discharge its bounden duty of excluding access to the appellant's room by others.

[33] Similarly in *Mohamad Abdul Rahman v. PP* [2013] 7 CLJ 843 where the room where the drugs were found was not locked and was accessible to all, the Court of Appeal said:

[25] We find that in the instant appeal the prosecution had failed to discharge that duty. We are reminded of the Federal Court's decision in *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1; [1995] 2 MLJ 433 and wish to reiterate what was stated by Edgar Joseph Jr FCJ at pp. 6-7 (CLJ), p. 440 (MLJ):

> ... while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial ... it also has a duty to call all of the necessary witnesses to establish proof against the accused beyond all reasonable doubt, and if, in the exercise of its discretion, it fails to fulfil this obligation, which is nothing less than a statutory duty, the accused must be acquitted.

[26] Likewise, the appellant in the instant appeal ought to have the benefit of the prosecution's failure.

[34] In *Lean Siew Boon & Anor v. PP & Other Case* [2013] 1 LNS 979; [2014] 2 MLJ 572 the prosecution did not exclude Koay Gim Bee, whose insurance policy was found in the condominium unit where the drugs were recovered. Speaking for the Court of Appeal, Tengku Maimun binti Tuan Mat JCA said:

[25] In the circumstances, we agree with the appellants that there is a gap in the prosecution's case which had not been bridged (see *Abdullah Zawawi v. Public Prosecutor* [1985] 2 MLJ 16).The onus is not on the defence to prove the possibility of others having access to the said unit but on the prosecution to exclude such possibility (see *Abdullah Zawawi bin Yusoff v. Public Prosecutor* [1993] 3 MLJ 1). We find that the learned trial judge had seriously misdirected himself on this issue when His Lordship said:

> This court views that the mere fact that there is evidence of access by other person or persons (leaving aside the accused persons/ persons) to the premises or apartment unit where drugs and/or drug processing paraphernalia are found does not necessarily mean that there is a possibility such person or persons would have some form of involvement in the incriminating exhibits there.
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> This is because it is a known fact of life that it will inevitably happen that certain categories of people will drop by any premises or apartment units and so forth like family siblings, friends, relatives, office colleagues, plumbers, television repairman, water and electricity meter readers *etc* at certain period. Therefore if such access occurs, it must be shown that there is an involvement in the incriminating exhibits in order to exculpate an accused. In the instant case, the prosecution had shown that there was no possibility of access by others to the unit. It must be borne in mind that both the accused persons lived on the 16th floor and therefore in close proximity to the 30th floor in the same block. Thus any attempt to gain unlawful access to the unit would sooner or later draw the attention of the first and second accused persons to such presence.

[35] In the case of *Ooi Chee Seong & Anor v. PP* [2014] 7 CLJ 505; [2014] 3 MLJ 593, the Court of Appeal opined that the failure by the prosecution to exclude one Ang Kim Hock who was the actual occupier of the condo in which the drugs were recovered also had created a gap in the prosecution's case and s. 114(g) of the Evidence Act can be invoked.

[36] Last but not least, in the case of *Mazlani Mansor v. PP* [2013] 1 LNS 1292; [2014] 2 MLJ 18 the defence contended that one Suratman, the worker and friend of the first accused had a key to the premise where the proscribed drugs were found, thus raising the defence that Suratman had access to the drugs as well. Suratman was not called to give evidence. The High Court

convicted the accused and the conviction was affirmed by the Court of Appeal. However, on appeal to the Federal Court, the decision was overturned based on the issue of accessibility.

[37] It is pertinent to note that the arrest and detention of the accused was based on information received, of which this court had to be cautious, as there was always the possibility that the drugs were planted. In this respect, the Federal Court in the case of *Ibrahim Mohamad & Anor v. PP* [2011] 4 CLJ 113 stated that:

> [12] The Supreme Court in *Abdullah Zawawi* had therefore highlighted the danger of relying on a tip-off's case as there is a possibility that in such a situation the drugs may have been planted in order to implicate the accused. Hence the need for the prosecution to exclude the possibilities that other individuals may have access to the drugs in question. We find on a proper perusal of the evidence it would show that the prosecution had failed to exclude the possibility of others having access to the said vehicle. No evidence whatsoever was adduced by the prosecution to exclude the possibility that Zainuddin and/or other individuals had access to the vehicle prior to the date of arrest. This is further compounded when the courts below erroneously took the position that the failure to call Zainuddin is not fatal as he was not together with both the accused when they were arrested. We also noted even Zainuddin's statement that was taken from him was not adduced and tendered as evidence pursuant to s. 32(1)(i) of the Evidence Act 1950 if at all for some valid reasons Zainuddin could not be called to give evidence.

[38] Against the backdrop of all the authorities cited above, this court opined that the learned Magistrate failed to analyse critically the evidence before him when he failed to take this fact of accessibility to others into account and that s. 114(g) of the Evidence Act ie, adverse inference should be invoked against the prosecution for the non-calling of these witnesses. Such failure is fatal. On this point alone, the defence should not have been called and the appeal be allowed.

[39] Further, this court opined that the prosecution's failure to call Zulazhan has also created a gap in the prosecution's case (see *Ooi Chee Seong & Anor* [2014] 7 CLJ 505; [2014] 3 MLJ 593) and this also had amounted to a suppression of evidence, notably because of the following reasons:

(i) It was the prosecution's case that the accused obstructed SP4 from opening the container box containing the drugs, hence such conduct showed her knowledge and ownership of the drugs. However, it was suggested by the defence through the prosecution witnesses especially SP4, SP5, SP7 (raiding team) during the prosecution case that this was not true. In short, the defence case/version was already suggested from the very beginning. In this regard, where there are two versions of the story, it is incumbent on the prosecution to call Zulazhan who was at the scene who was also arrested together with the accused. Had

Zulazhan testified, he could have shed more light on these two versions of the evidence and might have given evidence favouring the defence. Such failure of the prosecution amounts to a suppression of evidence and the invoking of the adverse inference against them under s. 114(g) of the Evidence Act.

(ii) In addition, it was suggested during the prosecution's case ie, through all the prosecution witnesses in the raiding team (ie, SP4, SP5 and SP7) that Nadia (SP7) only came later, after the discovery of the drugs (for the purpose of effecting an arrest on a female suspect) as the earlier information that was received was relating to drugs activity involving a man, and not a woman suspect. All the prosecution witnesses denied. Hence, it was incumbent on the prosecution to call Zulazhan to explain this fact, and this failure could invoke an adverse inference against the prosecution as well.

(iii) It was agreed by the prosecution witnesses upon suggestion by the defence that there was a gaping hole the kitchen. However all the prosecution witnesses disagreed that the hole was big enough for any persons to come in, through it, hence discounting the possibility that anybody may have access to the house through that hole. Only Zulazhan could give a neutral answer on this matter. Again, this failure to call him amounted to a suppression of evidence, and this had caused an adverse inference to be invoked against the prosecution.

(iv) Finally, the evidence thus far adduced by the prosecution did not exclude the possibility of Zulazhan himself having access, custody and control of the drugs as mentioned earlier. Had he been called by the prosecution, he could have explained and also possibly testify to the effect that other persons such as Lani Botak and Mr X and also perhaps his (Zulazhan's) friends who came to the house, have access to the house and the drugs. Such a failure on the part of the Magistrate is fatal.

[40] Hence, it is patently clear that the prosecution tried to suppress such important evidence of accessibility by not calling Zulazhan to testify and that an adverse inference should be invoked against them.

[41] This court opined that again the learned Magistrate failed to analyse critically all the evidence and failed to take those facts into account. Instead, he shifted the burden on the defence to call Zulazhan as defence witness (see authorities cited earlier). At p. 22 of the RA, this was what he said:

> Semasa kejadian anak OKT ada bersama dan OKT boleh memanggil anak beliau untuk menjadi saksi untuk menyokong keterangan beliau dan seterusnya menimbulkan keraguan munasabah ke atas kes pendakwaan. OKT juga sepatutnya dengan mudah mengemukakan anak beliau untuk memberikan keterangan di dalam kes ini untuk menyokong keterangan beliau namun ini tidak dilakukan ...

[42] This was patently wrong as it is trite that the burden is on the prosecution to exclude the accessibility of others to the drugs in question (see the authorities cited earlier).

Ruling Of This Court

[43] Having subjected all the evidence to strict scrutiny (on maximum evaluation) and this court having asked itself this question: if I decide to call upon the accused to enter her defence and she elects to remain silent, am I prepared to convict her on the totality of the evidence contained in the prosecution case?. This court answers in the negative.

[44] Having answered in that manner, this court rules that the prosecution had failed to make out a *prima facie* case, thus the accused should have been acquitted and discharged without her defence being called by the Magistrate.

The Defence Case

[45] On the assumption that this court was wrong in arriving at that decision, this court will now evaluate and analyse the defence case.

[46] It is trite that to earn an acquittal, the court may not be convinced of the truth of the defence story or version. Raising a reasonable doubt on the guilt of the accused will suffice - see *Mohammad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311; [1991] 3 MLJ 169. It is also the duty of the court that at the end of the defence case, the court should make a maximum evaluation by subjecting the defence case against the prosecution's case. This court will now evaluate and analyse the Magistrate's findings. The Magistrate, at p. 22 of the RA, made the following findings:

> Di dalam kes in setelah meneliti keterangan yang dikemukakan oleh pihak pembelaan Mahkamah mendapati pembelaan OKT tidak dapat menimbulkan keraguan yang munasabah ke atas kes pendakwaan. Pembelaan OKT hanyalah bersifat penafian semata-mata untuk melepaskan diri daripada pertuduhan.
>
> Terdapat dua versi kejadian yang berbeza dimana menurut versi pembelaan OKT semasa barang kes dijumpai SP4 tiada di tempat kejadian dan OKT juga tidak menghalang SP4 semasa barang kes hendak diperiksa kerana SP4 tiada di tempat kejadian pada masa tersebut. Versi OKT ini amat berbeza dengan versi pendakwaan di mana di peringkat pendakwaan SP4 telah memberikan keterangan bahawa beliau ada bersama ketika kejadian dimana serbuan telah dibuat oleh SP4 bersama-sama beberapa anggota yang lain dan semasa barang kes dijumpai OKT telah menghalang SP4 ketika SP4 hendak memeriksa P5.
>
> Setelah meneliti kedua-dua versi kejadian Mahkamah dapati versi pendakwaan lebih diyakini (more probable) kerana pertamanya keterangan saksi-saksi pendakwaan adalah konsisten mengenai kejadian ini. Keterangan SP4 mengenai kejadian ini juga disokong oleh SP5 dan SP7. Keterangan OKT mengenai kejadian yang mana SP4 tidak berada di

tempat kejadian dan beliau tidak pernah menghalang SP4 membuat pemeriksaan adalah mustahil dan sukar untuk dipercayai kerana tidak disokong oleh mana-mana keterangan.

[47] This court had scrutinised the evidence of the defence. The accused testified under oath as SD1. In her evidence, she said that when the police team came and identified themselves they said they wanted to check whether there was a 'barang' or not. When she asked what 'barang', they went straight to the kitchen. The accused just remained silence and looked at them. Only three police personnel were involved. SP4 and SP7 were not there and they were all men.

[48] According to her, it was the police team who retrieved the container containing the drugs from below the kitchen and showed it to her. She denied that it was she who retrieved it, and denied that she obstructed the police from opening it.

[49] Here is an abstract of her evidence as envisaged at pp. 128 to 129 of the appeal record:

S : Selepas ke dapur?

J : Dia terus ke tempat letak kotak di bawah dapur yang berwarna biru, dia buka, dia naik dan panggil kawan

S : Ketiga-tiga polis itu lelaki atau perempuan?

J : Semuanya lelaki

S : Apa tindakan kawan dia?

J : Dia memanggil kawan dia yang seorang lagi dan menuju ke dapur, ambil kotak letak di ruang tamu. Selepas dia buka salah satu ada tupperware warna merah.

S : Semasa pihak polis mengambil kotak berwarna biru apa tindakan Cikgu Da ketika itu?

J : Saya dan anak hanya berdiam diri sahaja

S : Apa ada dalam tupperware tersebut?

A : Ada plastik warna biru

[50] According to her it was the police who had opened the container and told her that they were drugs (pil kuda). This was what she said at p. 128 of the RA.

S : Cikgu Da tahu apa isi dalam plastik warna biru tersebut?

J : Saya tidak tahu

S : Ada polis buka bekas warna merah itu?

J : Ada

S : Cikgu Da tengok atau tidak masa polis buka?

J : Tengok dan dia tanya ini apa. Saya cakap tidak tahu

S : Selepas itu?

J : Polis bagitahu itu pil kuda

S : Selepas itu apa tindakan Cikgu Da masa itu?

J : Dia suruh saya duduk di ruang tamu
S : Selepas itu apa yang berlaku?
J : Saya diam sahaja

[51] She further testified that she was placed at the 'ruang tamu' until about 10pm when the policewoman by the name of Nadia and SP4 came to effect the arrest.

[52] At p. 130 of the RA, this was what she said:

S : Siapa polis perempuan dan siapa polis lelaki?
J : Saya tahu hanya Nadia sebab dia pakai nama
S : Yang seorang lagi?
J : Saya tidak tahu nama, tapi saya tahu masa dalam Mahkamah Tuan Saufi (SP4)
S : Apa tindakan 2 orang anggota polis buat?
J : Nadia ajak saya masuk ke bilik untuk check badan saya dan duduk semula kat ruang tamu dan dia bawa pergi ke Balai Polis
S : Cikgu Da ingat tak masa keterangan Tuan Saufi berkenaan Dengan Cikgu Da menghalang semasa buat pemeriksaan?
J : Saya tidak pernah menghalang, macam mana nak menghalang sedangkan Tuan Saufi tiada masa itu.
S : Tuan Saufi sampai keadaan macam mana?
J : Keadaan sudah selesai dan barang letak kat ruang tamu saya

[53] The accused further testified that because it was an old kampung house, she would usually lock the house before leaving, and sometimes when she came back she found the door was opened and even unlocked (p. 131 of the RA). At p. 138, under re-examination she said:

> Mudah masuk sebab pintu depan dan di jendela dapur tidak berpaku, tak berlock dan berlubang ...

She had further testified that the husband will come back and stay at the house once a month.

[54] SD2 testified that on that day she was with the accused until late evening just before Maghrib prayers. She was the one who had sent her home. She also described about the good disposition of the accused. SD3, a neighbour testified amongst others that during the arrival time of the police team (about after Maghrib) he saw there were only male policemen. At around 10pm he saw a policewoman arrived in a police car.

[55] This court had subjected the defence and the prosecution case to a maximum evaluation by testing the case of defence case against that of the prosecution. This court had embarked on a balancing exercise to achieve a fair and just assessment by considering and weighing all the evidence before

it in the light of the well-established principle in *Mat v. PP* [1963] 1 LNS 82; [1963] 1 MLJ 263 with regard to the approach to be taken in evaluating the evidence of the defence *vis-à-vis* that of the prosecution.

[56] Having done so, and against the backdrop of the findings made by this court earlier at the prosecution stage as discussed at length above, this court found that the defence case to be more probable than that of the prosecution. The infirmities found by this court, at the *prima facie* stage, had undoubtedly undermined the strength of the prosecution's case, of which had affected greatly the credibility of their witnesses, but had strengthened the defence case. This was further supported by the evidence of SD3 which lends credence to the defence story that SP7 came only after the discovery of the drugs at around 10pm, and not at 8pm thus adding cogency to the defence suggestion earlier that the target of this raid was a male suspect, and not at the accused, being a female.

[57] Be that as it may, as the burden of the accused is just to raise a reasonable doubt, at the end of the defence case this court had found that the defence had successfully discharged that burden, and that the prosecution had failed to prove its case beyond a reasonable doubt, and therefore that the conviction found by the learned Magistrate was wrong and unsafe.

Conclusion

[58] In the upshot, this court allowed the appeal of the appellant, set aside the decision of the Magistrate and acquitted and discharged the appellant.

[59] For the sake of completeness, the prosecution had posed a question of law regarding the issue of conduct. This court is of the view that conduct has always been a relevant consideration to be reckoned with especially in drugs cases to infer knowledge of the drugs.

[60] Notwithstanding, not all conduct is admissible under s. 8 of the Evidence Act. It is to be emphasised that only conduct that is relevant to the facts in issue are admissible. Once admitted as evidence, the onus is on the accused to explain of such conduct of his under s. 9 of the Evidence Act. The late Augustine Paul FCJ (as he then was) had summarised it in the case of *Parlan Dadeh v. PP* [2009] 1 CLJ 717 (FC). See other cases on conduct such as *Teng Howe Sing v. PP* [2009] 3 CLJ 733; *Teh Hock Leong v. PP* [2008] 4 CLJ 764; [2010] 1 MLJ 741 and *PP v. Alfian* [2011] 1 LNS 1731; [2012] 2 MLJ 357.

[61] Insofar as this case is concerned, this court believes the version of the defence that the accused did not obstruct SP4 in opening the container which contained the drugs, hence the question of conduct does not arise.